IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. MITCH BUESING, Defendant–Appellant.	)))))))))	S. CT. NO. 17–1750

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE COLLEEN WEILAND, JUDGE (Sentencing)

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On 11th day of June, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Mitch Buesing, No. 6036777, North Central Correctional Facility, 313 Lanedale, Rockwell City, IA 50579.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because an issue raised involves a substantial issue of first impression in Iowa and presents a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c), and 6.1101(2)(f). Specifically, it argues the use of actuarial risk assessment instruments in sentencing violates the Defendant–Appellant's constitutional due process rights. In the alternative, it requests the Court adopt guidelines to ensure the use of actuarial risk assessment instruments in sentencing proceedings comply with due process.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Mitch Buesing appeals his convictions, sentences, and judgment following his guilty pleas to theft in the first degree, in Cerro Gordo District Court Case No. FECR025529, and theft in the second degree, in Cerro Gordo District Court Case No. FECR026099.

Course of Proceedings: On September 9, 2016, the State charged Buesing with count I: theft in the second degree, a class "D" felony, in violation of Iowa Code sections 714.1(1) and 714.1(2); and count II: burglary in the second degree, a class "C" felony, in violation of Iowa Code sections 713.1 and 713.5 in Case No. FECR025529. (FECR025529 Trial Information) (App. pp. 4–5). A few days later, on September 12, 2016, the State amended count I to theft in the first degree, "C" felony, in violation of Iowa Code sections 714.1 and 714.2(1). (FECR025529 Mot. Amend; FECR025529 Amended Trial Information; FECR025529 Order Amending) (App. pp. 6–10). On September 20, 2016, Buesing filed a written arraignment and plea of not guilty, and he also waived his right to a speedy trial under Iowa Rule of Criminal Procedure 2.33(2)(b). (FECR025529 Written Arraignment & Plea) (App. pp. 11–12).

On April 7, 2017, the State charged Buesing with theft in the second degree, a class "D" felony, in violation of Iowa Code sections 714.1(1) and 714.1(2) in Case No. FECR026099.

(FECR026099 Trial Information) (App. pp. 13–14). Buesing filed a written arraignment, plea of not guilty to the charge, and waiver of speedy trial on April 18, 2017. (FECR026099 Written Arraignment & Plea) (App. pp. 15–16).

On September 12, 2017, Buesing filed written pleas of guilty to count I: theft in the first degree in Case No. FECR025529 and theft in the second degree in Case No. FECR026099. (FECR025529 Guilty Plea & FECR026099 Guilty Plea) (App. pp. 17–22). The written pleas both stated: "County Attorney to support the recommendations of the Pre-Sentence Investigation." (FECR025529 Guilty Plea & FECR026099 Guilty Plea) (App. pp. 18, 21). The pleas also noted the State would recommend the minimum fines for each charge, surcharges, court costs, and restitution, if any was requested. (FECR025529 Guilty Plea & FECR026099 Guilty Plea) (App. pp. 18, 21). The State would also recommend the sentences in FECR025529 and FECR026099 run consecutively to one another, but concurrently with two other cases. (FECR025529 Guilty Plea & FECR026099 Guilty Plea)

(App. pp. 18, 21). Later that same day, the district court accepted Buesing's guilty pleas to count I: theft in the first degree in Case No. FECR025529 and count I: theft in the second degree in Case No. FECR026099 after a colloquy in open court. (Plea Tr. p.2 L.3–p.12 L.18). The plea agreement was also stated on the record in open court during the plea hearing. (Plea Tr. p.7 L.4–p.8 L.2).

A presentence investigation report was conducted. (PSI) (Confidential App. pp. 11–25). Sentencing was held on October 30, 2017. (Sentencing Tr. p.2 L.4–15). After hearing a victim impact statement, argument from the State and defense counsel, and Buesing's allocution, the district court sentenced Buesing to indeterminate terms not to exceed ten years in Case No. FECR025529 and five years in Case No. FECR026099. (Sentencing Tr. p.4 L.21–p.17 L.23) (FECR025529 Judgment Entry & FECR026099 Judgment Entry) (App. pp. 23–28). The district court ordered the sentences to run consecutively with one another for a total of fifteen years in prison. (Sentencing Tr. p.18 L.19–20)

(FECR025529 Judgment Entry & FECR026099 Judgment Entry) (App. pp. 23, 26).

The court ordered the minimum fines in each case, along with the thirty-five percent criminal surcharges, but then ordered them suspended. (Sentencing Tr. p.16 L.21–23, p.18 L.21–22) (FECR025529 Judgment Entry & FECR026099 Judgment Entry) (App. pp. 23, 26). The court also ordered Buesing to pay the law enforcement initiative surcharges in both cases, court costs, and victim restitution, but it found Buesing was unable to pay restitution for attorney fees. (Sentencing Tr. p.16 L.24–25, p.17 L.6–8, p.18 L.23–24, p.19 L.7–16) (FECR025529 Judgment Entry & FECR026099 Judgment Entry) (App. pp. 23–24, 26–27). In addition, the court ordered Buesing to submit a DNA sample. (Sentencing Tr. p.17 L.1–2, p.18 L.25–p.19 L.1) (FECR025529 Judgment Entry & FECR026099 Judgment Entry) (App. pp. 24, 27). Lastly, the district court dismissed the remaining count of the trial information in Case No. FECR025529. (FECR025529 Order Dismissal) (App. pp. 31–32).

On November 1, 2017, Buesing timely filed a notice of appeal in each case. (FECR025529 Notice & FECR026099 Notice) (App. pp. 29–30).

Facts: During the guilty plea proceeding, the following exchange occurred regarding the factual basis regarding Case No. FECR025529:

> THE COURT: Can you tell me what you did that got you here to court today?
>
> . . .
>
> THE DEFENDANT: I took possession of stolen property and with the intent to deprive, the value of the property more than $10,000.
>
> THE COURT: Okay. You took possession of property. Did you have permission to take it?
>
> THE DEFENDANT: No.
>
> THE COURT: Did you intend to keep it or deprive the other person from having it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And I think you told me you believe the value of that property was over 10,000.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you possess it with the specific intent to deliver it to another person?

THE DEFENDANT: Yes, I did.

(Plea Tr. p.10 L.3–23). With regards to Case No. FECR026099, there was the following colloquy:

> THE COURT: And can you tell me what you did that got you to court here on this case?
>
> THE DEFENDANT: I possessed or controlled stolen property knowing that the property was stolen, and I didn't -- I didn't attempt to return it or notify the police. And it was exceeding more than a thousand dollars.

(Plea Tr. p.11 L.12–23).

Any additional relevant facts will be discussed below.

ARGUMENT

THE DISTRICT COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS BY CONSIDERING AND RELYING UPON THE IOWA RISK REVISED (IRR) ASSESSMENT WHEN IMPOSING THE SENTENCES. IN THE ALTERNATIVE, THE DISTRICT COURT ABUSED ITS DISCRETION BY CONSIDERING THE RISK ASSESSMENT WITHOUT AN UNDERSTANDING OF THE PURPOSE AND LIMITATIONS OF THE ASSESSMENT.

A. Preservation of Error: The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Thus, these arguments are not subject

to the usual concept of waiver or the requirement of error preservation. State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000) (citing State v. Ohnmacht, 342 N.W.2d 838, 842–43 (Iowa 1983)). See also State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1998) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal.").

To the extent this Court concludes error was not properly preserved for any reason, Buesing respectfully requests that this issue be considered under the Court's familiar ineffective-assistance-of-counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: A violation of a constitutional right to due process and claims of ineffective assistance of counsel are reviewed de novo. State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012); Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). The Court reviews a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907

(2017). See also State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002).

"A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998) (citing State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983)). To demonstrate an abuse of discretion, the defendant must show that the sentencing court's discretion "was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

C. Discussion: A sentencing hearing "must measure up to the essentials of due process and fair treatment." State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990). See also Kent v. United States, 383 U.S. 541, 562 (1966) (citation omitted). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence . . . ."

Gardner v. Florida, 430 U.S. 349, 358 (1977) (citation omitted). Moreover, a criminal defendant has a constitutional due process right to be sentenced on accurate information. Townsend v. Burke, 334 U.S. 736, 741 (1948) ("[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such conviction cannot stand.").

In explaining the reasons for the sentence in this case, the district court stated:

> In regard to sentencing, the law of Iowa requires that I consider your rehabilitation; that I consider the protection of society; and that I consider factors related to deterrence, both trying to convince you and other people not to commit criminal acts. Those are the three goals that I keep in mind when I'm looking at the specific information that I learn about you. In regard to learning about you, I do that through the case file and from the presentence-investigation report, and then anything that you -- the two attorneys and you have presented here today. And then I try to pick the sentence within the parameters of the law that best provides for those three goals.
>
> I have considered all of those goals when I reviewed the pre-sentence investigation and the case file and considered what these two attorneys

have told me and considered what you've allocated with.

It is unusual for someone -- for me to send someone to prison who has a relatively minimal criminal history. But I don't have to follow that. That's just the general -- not even a guideline, but history, when I'm considering whether a person can be rehabilitated in the community, and whether or not their probation would serve as deterrence and protection of society, because it often does with somebody who does not have a criminal history.

I do not feel that way about you. There is nothing in regard to these violations or the information in the pre-sentence investigation report that makes me think that supervision in the community will be successful in regard to your rehabilitation, in regard to -- or in regard to deterrence. And you have shown us from these violations that when you are released in the community, the community is not safe. So I am not suspending the sentence as requested by you.

(Sentencing Tr. p.15 L.5–p.16 L.12). In addressing the question of whether the sentences for the theft offenses should be ran consecutively to one another or concurrently, the court explained:

In the consideration of whether these two terms should be concurrent or consecutive, I have considered what I have already stated in regard for the reasons for imposing prison. I have also noted how poorly the supervision has gone in regard to the two other cases that we're here for today. Specifically, in regard to seemingly taking very lightly drug testing, either taking lightly or

> flagrantly disregarding the need to monitory you through ankle monitoring by allowing the charging -- or battery to be not charged on several occasions. The PSI would reflect a relatively flippant attitude towards being willing to be supervised and being willing to abide by terms of supervision.
>
> Additionally, the fact that you're willing to offend in a similar way twice more when you're on probation. And then in regard to the final one, once more when you're on release from one -- from a charge convinces me that your rehabilitation is going to be tough to come by and deterrence is going to be tough to come by with you. I am ordering that those two cases be served consecutively.

(Sentencing Tr. p.18 L.2–20). Lastly, near the end of the hearing, the district court also stated:

> There is something that I failed to reflect on the record that I took in my notes when considering the sentence that I do want the record to reflect it because *I did take it into consideration, and that was a validated risk assessment as reflected in the PSI showing Mr. Buesing to be at high risk.*

(Sentencing Tr. p.22 L.6–11) (emphasis added).

The district court's reference to the validated risk assessment in the presentence investigation report relates to a single paragraph in the report. The reported stated the IRR was a validated risk assessment, and all eight judicial district

departments of correctional services utilized it. (PSI p. 14) (Confidential App. p. 24). The report stated the assessment was completed on Buesing, and he was determined to be high risk. (PSI p. 14) (Confidential App. p. 24).

Although the Iowa Supreme Court has not yet addressed the proper use of risk assessment tools in sentencing,[1] courts in Indiana and Wisconsin have addressed the issue and provide some guidance.

The Indiana Supreme Court considered whether and in what manner may a judge consider the results of various assessment tools in Malenchik v. State. See Malenchik v. State, 928 N.E.2d 564, 567–68 (Ind. 2010). In Malenchik, the

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[1] The Court of Appeals addressed the admissibility of the results of several risk assessments combined with expert testimony in a sexually violent predator civil commitment trial. In re Detention of Holtz, 653 N.W.2d 613, 619–620 (Iowa Ct. App. 2002). The Court found no error in the admission of the actuarial risk assessment tool based on the record as a whole. The Court noted: "By this ruling, we are not concluding that actuarial risk assessment instruments are reliable per se or have our approval when used alone and not in conjunction with a full clinical evaluation. We note this was not the situation or issue presented in the instant case. The instruments *were* used in conjunction with a full clinical evaluation and their limitations were clearly made known to the jury." Id. (emphasis in original).

defendant argued it was improper for the sentencing court to consider the risk assessment scores because the tests themselves were not scientifically reliable, were not relevant to legitimate sentencing considerations, and violated "Indiana's constitutional requirement that the penal code be founded on principles reformation and not vindictive justice." Id. at 567.

The Indiana Supreme Court ultimately concluded that the tests were scientifically sound and could be utilized by a sentencing court when crafting an appropriate sentence: "[W]e hold that legitimate offender assessment instruments do not replace but may inform a trial court's sentencing determinations and that, because the trial court's consideration of the defendant's assessment model scores was only supplemental to other sentencing evidence that independently supported the sentence imposed, we affirm the sentence." Id. at 566 (footnote omitted). Prior to this promulgation, the court discussed the limitations and purposes of the risk assessment tools:

> While there may be strong statistical correlation of assessment results and the risk or

probability of recidivism, the administrator's evaluation as to each question may not coincide with that of the trial judge's evaluation based on the information presented at sentencing. The nature of the LSI–R is not to function as a basis for finding aggravating circumstances, nor does an LSI–R score constitute such a circumstance. But LSI–R scores are highly useful and important for trial courts to consider as a broad statistical tool to supplement and inform the judge's evaluation of information and sentencing formulation in individual cases. The LSI–R manual directs that it is not "to be used as a substitute for sound judgment that utilizes various sources of information." Significantly, the manual explicitly declares: "This instrument is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and was never designed to assist in establishing the just penalty."

. . .

It is clear that neither the LSI–R nor the SASSI are intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender. But such evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters. The scores do not in themselves constitute an aggravating or mitigating circumstance because neither the data selection and evaluations upon which a probation officer or other administrator's assessment is made nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant

> sentencing factors. Having been determined to be statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.

Id. at 572–73 (internal citations omitted). Thus, the Indiana Supreme Court held that the results of LSI–R and SASSI offender assessment instruments are appropriate supplemental tools for judicial consideration at sentencing. The Court found emphasized the evaluations and their respective scores are not intended to be considered as aggravating or mitigating circumstances nor should they be used to determine the total length of sentence; however a "trial court may employ such results in formulating the manner in which a sentence is to be served." Id. at 575.

More recently, the Wisconsin Supreme Court reviewed the benefits and ill effects of evidence-based sentencing upon a certified question from the Wisconsin Court of Appeals in State v. Loomis. See State v. Loomis, 881 N.W.2d 749, 752–56 (Wis.

2016), cert. denied, 137 S.Ct. 2290 (2017). The Court acknowledged criticism of the "efficacy of evidence-based sentencing and . . . concern[s] about overselling the results." Loomis, 881 N.W.2d at 759. Specifically, critics "urge that judges be made aware of the limitations of risk assessment tools, lest they be misused." Id.

> In the main, [supporters] have been reticent to acknowledge the paucity of reliable evidence that now exists, and the limits of the interventions about which we do possess evidence. Unless criminal justice system actors are made fully aware of the limits of the tools they are being asked to implement, they are likely to misuse them.

Id. at 759–60 (quoting Cecelia Klingele, The Promises and Perils of Evidence–Based Corrections, 91 Notre Dame L. Rev. 537, 576 (2015)). The Loomis Court "heed[ed] this admonition," noting the DOC's acknowledgement in the presentence investigation report that "'risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated.'" Loomis, 881 N.W.2d at 760.

The Loomis Court, focusing exclusively on the use of the risk assessment tool at sentencing and considering the due

process arguments regarding accuracy, determined that use of a COMPAS risk assessment must be subject to certain cautions in addition to the limitations set forth. Id. at 763.

> Specifically, any PSI containing a COMPAS risk assessment must inform the sentencing court about the following cautions regarding a COMPAS risk assessment's accuracy: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations. Providing information to sentencing courts on the limitations and cautions attendant with the use of COMPAS risk assessments will enable courts to better assess the accuracy of the assessment and the appropriate weight to be given to the risk score.

Id. at 763–64.

The Court in Loomis also addressed the defendant's argument that the use of the COMPAS instrument violated due

process because the test score is based on group data[2] but a defendant is entitled to an individualized sentence, and the court again limited the use of the instrument in the sentencing decision. Id. at 764.

> Next, we address the permissible uses for a COMPAS risk assessment at sentencing. Then we set forth the limitations and cautions that a sentencing court must observe when using COMPAS.
>
> Although it cannot be determinative, a sentencing court may use a COMPAS risk assessment as a relevant factor for such matters as: (1) diverting low-risk prison-bound offenders to a non-prison alternative; (2) assessing whether an offender can be supervised safely and effectively in the community; and (3) imposing terms and

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[2] A COMPAS Practitioner's Guide commented that "[r]isk assessment is about predicting group behavior . . . it is not about prediction at the individual level." Loomis, 881 N.W.2d at 764 (internal quotation marks and citation omitted). "Risk scales are able to identify groups of high-risk offenders—not a particular high-risk individual." Id. The Wisconsin Department of Corrections explained that "staff are predicted to disagree with an actuarial risk assessment (e.g. COMPAS) in about 10% of the cases due to mitigating or aggravating circumstances to which the assessment is not sensitive." Id. (internal quotation marks and citation omitted). The DOC stated that "staff should be encouraged to use their professional judgment and override the computed risk as appropriate . . . ." Id. (internal quotation marks and citation omitted).

> conditions of probation, supervision, and responses to violations.

Id. at 767.

The Court found a COMPAS risk assessment may be properly used to "enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant." Id. at 768. Furthermore, the Court "set forth the corollary limitation that risk scores may not be used as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community." Id.

Because the risk assessments were designed to address treatment needs and identify the risk of recidivism, but sentencing encompasses broader purposes, "using a risk assessment tool to determine the length and severity of a sentence is a poor fit." Id. at 769. As such, the Wisconsin Supreme Court identified the necessary limitations to the consideration of risk assessments when imposing sentence, specifically heeding the recommendations of the National

Center for State Courts. See id. at 768. See also Pamela M. Casey et al., National Center for State Courts (NCSC), Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group (2011), available at http://www.ncsc.org/Services-and-Experts/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx. The Court ruled:

> Thus, a sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.
>
> Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.
>
> Any Presentence Investigation Report ("PSI") containing a COMPAS risk assessment filed with the court must contain a written advisement listing the limitations. Additionally, this written advisement

should inform sentencing courts of the following cautions as discussed throughout this opinion:

- The proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are determined.

- Because COMPAS risk assessment scores are based on group data, they are able to identify groups of high-risk offenders—not a particular high-risk individual.

- Some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism.

- A COMPAS risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed. Risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.

- COMPAS was not developed for use at sentencing, but was intended for use by the Department of Corrections in making determinations regarding treatment, supervision, and parole.

It is important to note that these are the cautions that have been identified in the present moment. For example, if a cross-validation study for a Wisconsin population is conducted, then flexibility is needed to remove this caution or explain the results of the cross-validation study. Similarly, this

> advisement should be regularly updated as other cautions become more or less relevant as additional data becomes available.

Loomis, 881 N.W.2d at 768-770. See also Cecelia Klingele, The Promises and Perils of Evidence–Based Corrections, 91 Notre Dame L. Rev. 537, 576 (2015) (stating that in order to remain accurate, risk assessment tools "must be constantly re-normed for changing populations and subpopulations.").

In this case, the district court improperly considered and relied on the risk assessment scores contained in the Iowa Risk Revised.

> "[C]onsider" and "rely" . . . are not interchangeable. "Rely" is defined as "to be dependent" or "to place full confidence." . . . "On the other hand, "consider" is defined as "to observe" or to "contemplate" or to "weigh."

Loomis, 881 N.W.2d at 772 n.2 (Roggensack, C.J., concurring) (quoting Webster's New Collegiate Dictionary 977 (1974)). Under the circumstances of this case, it is necessary to discuss consideration and reliance separately.

First, it was improper for the district court to consider the risk assessment scores in determining the appropriate

sentence. The district court was not aware of the intended purpose or limitations of the Iowa Risk Revised (IRR) risk assessment tool. (PSI p. 14) (Confidential App. p. 24). In fact, the presentence investigation report contained no information about the assessment tool except that it was used in each of the judicial districts, Buesing completed it, and it determined Buesing "to be high risk."[3]

First, this Court should find that such risk assessments should not be used in sentencing; at least not until there is accurate information on how they are developed, used, and

[3] The Iowa Risk Revised is a screening tool used by the Department of Corrections for assessing risk. "It takes into consideration several factors; for example - age, criminal history, gang affiliation, prior revocations in the community. The assessment helps determine risk of violence and victimization as well as predicting general recidivism. It includes several dynamic factors . . . [including] employment, housing instability, substance abuse, prior revocations." See Iowa Board of Corrections Agenda, Attached Handouts 40 (April 7, 2017), available at https://doc.iowa.gov/sites/default/files/documents/2017/04/april_7_2017_board_of_corrections_handouts_-_mpcf_1.pdf. The IRR "assist[s] in developing offender case plans, levels of supervision, and treatment programs. Automated scoring saves staff time and improves accuracy." See Legislative Services Agency, Budget Unit Brief FY 2017, Iowa Corrections Offender Network 1 (Sept. 6, 2016), available at https://www.legis.iowa.gov/docs/publications/FT/15690.pdf.

their limitations. There is no indication that the risk assessment does not take into consideration inappropriate factors for sentencing; for example, the IRR apparently takes into account housing instability. See Iowa Board of Corrections Agenda, Attached Handouts 40 (April 7, 2017), available at https://doc.iowa.gov/sites/default/files/documents/2017/04/april_7_2017_board_of_corrections_handouts_-_mpcf_1.pdf. This is concerning because "markers of socioeconomic disadvantage increase a defendant's risk score, and most likely his sentence." Sonja B. Starr, Sentencing, by the Numbers, New York Times (Aug. 8, 2014), https://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html?hp&action=click&pgtype=Homepage&module=c-column-top-span-region%C2%AEion=c-column-top-span-region&WT.nav=c-column-top-span-region. See also Jonathan J. Wroblewski, U.S. Department of Justice, Criminal Division, Letter to The Honorable Patti B. Saris 7 (July 29, 2014), available at https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-

072814.pdf ("[E]xperience and analysis of current risk assessment tools demonstrate that utilizing such tools for determining prison sentences to be served will have a disparate and adverse impact on offenders from poor communities . . . ."). It is extremely concerning that one defendant could be deemed a higher risk merely because he is poor while another is lower simply because he is rich; nor is someone's socioeconomic status an appropriate sentencing consideration. Moreover, the accuracy of such risk assessments has been questioned and issues regarding racial disparity in the risk assessments have been raised. See, e.g., Julia Dressel & Hany Farid, The accuracy, fairness, and limits of predicting recidivism, Science Advances 1 (Jan. 17, 2018), available at http://advances.sciencemag.org/content/advances/4/1/eaao5580.full.pdf (discussing a study that showed "people from a popular online crowdsourcing marketplace—who it can reasonably be assumed, have little to no expertise in criminal justice—are as accurate and fair as COMPAS at predicting recidivism"); Julia Angwin et al.,

Machine Bias: There's a software used across the country to predict future criminals. And it's bias against blacks., Pro Publica (Mar. 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (noting in its study that the risk assessment was unreliable—only 20% of predicted defendant to violent reoffend actually did so—and it was more likely to label black defendants who did not reoffend as higher risk and white defendants who did reoffend as lower risk).

Because studies have shown the risk assessments to be unreliable and inaccurate, the district court's reliance on it in part to determine Buesing's sentence violates his constitutional due process right to be sentenced on accurate information. See Townsend, 334 U.S. at 741. In addition, because of its unreliability and the fact that it appears itself to rely on improper sentencing factors, it cannot be an appropriate sentencing consideration for the district court to rely upon under Iowa law. See Thomas, 520 N.W.2d at 313 (citation omitted) ("The important focus is whether an

improper sentencing factor crept into the proceedings; not the result it may have produced of the manner it may have motivated the court.").

Furthermore, in this case, the district court was not provided with sufficient cautions for and limitations of the risk assessment tool to allow the court to consider the results. The PSI must be required to specifically inform the sentencing court of the limitations of the assessment tools. See Loomis, 881 N.W.2d 769–70. The record does not specifically demonstrate these limitations. However, at a minimum, if risk assessments are to be used, there must be a written advisement that should include: (1) the risk assessment scores are based on group data and not specific to this individual defendant; (2) the existence of validation studies, including any cross-validation for an Iowa population; (3) the extent of the disclosure of the information used to determine the score such as question and answers with the formulas used; and (4) the purpose of the tool and that the risk

assessment tools were not developed for use at sentencing. See id. at 763–64.

Without these sufficient cautions and limitations provided, the consideration of the IRR assessment violated Buesing's due process rights. In the alternative, it was an abuse of discretion on the part of the sentencing court because it is "clearly untenable" and "clearly unreasonable" for the district court to rely on a risk assessment without proper knowledge of its applicability and any limitations. See Buck, 275 N.W.2d at 195. Additionally, the reliance on the risk assessment score without knowledge of its limitations violated Buesing's due process rights. As the Wisconsin Court in Loomis determined, the sentencing court cannot use the scores to determine whether an offender is incarcerated or to determine the severity of the sentence. See Loomis, 881 N.W.2d at 769. The district court improperly relied on the risk assessment scores to determine Buesing's sentence, including the decision he should be incarcerated and the severity of the sentences. See (Sentencing Tr. p.22 L.6–11).

If the Court determines the risk assessments are appropriately used in sentencing, Buesing requests the court adopt guidelines for use of actuarial risk assessment tools in sentencing proceedings which is consistent with due process guaranteed by the United States Constitution and the Iowa Constitution. See U.S. Const. amend. XIV; Iowa Const. art. I, § 9. Buesing must be granted a new sentencing hearing where a corrected Presentence Investigation Report can be considered. Only with precise information regarding the accuracy of the risk assessment and the purpose of such tools, along with sufficient written cautions and limitation, can Buesing's right to due process be protected during the sentencing proceeding.

In the event this Court determines the issue is not preserved for its review for any reason, trial counsel was ineffective for failing to challenge the sentence procedure and sentence imposed, which violated Buesing's constitutional right to due process. To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed

to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (citation omitted).

Buesing hereby incorporates by reference the argument outlined above. As the argument is legally meritorious, defense counsel breached an essential duty by failing to specifically make the above argument. See State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012) (stating counsel has a duty to know the law); State v. Vance, 790 N.W.2d 775, 789 (Iowa 2010) (discussing the information the attorney should have discovered if the attorney had researched the appropriate law). The Iowa Supreme Court has stated "that 'failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel.'" State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983) (quoting Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)). Had counsel kept abreast with sentencing law and policy from around the country or pending certiorari petitions in the United States Supreme Court, counsel would have been aware

of the Loomis case. See, e.g., Douglas A. Berman & Richard J. Watkins, Wisconsin Supreme Court rejects due process challenge to use of risk-assessment instrument at sentencing, Sentencing Law & Policy (July 26, 2016 06:59 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/wisconsin-supreme-court-rejects-due-process-challenge-to-use-of-risk-assessment-instrument-at-senten.html; Loomis v. Wisconsin, SCOTUSblog, http://www.scotusblog.com/case-files/cases/loomis-v-wisconsin/ (last visited Feb. 23, 2018); Jason Tashea, Risk-assessment algorithms challenge in bail, sentencing, and parole decisions, ABA Journal (March 2017), available at http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/. The Wisconsin Supreme Court decision is persuasive and provides minimal due process protection at sentencing; this argument was worth raising. See State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999) (noting counsel must exercise reasonable diligence in deciding whether an issue is worth raising or not).

If error was not preserved, Buesing was prejudiced by counsel's failure. As the argument is legally meritorious, defense counsel breached an essential duty by failing to specifically make the above argument. See State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)) (finding prejudice if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"); Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985) (quoting Strickland, 466 U.S. at 686) ("The '"benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."'"). If error was not preserved, Buesing was prejudiced by counsel's failure to adequately protect his rights at sentencing. Therefore, Buesing is entitled to a new sentencing hearing.

CONCLUSION

For the above argued reasons, Defendant–Appellant Mitch Buesing respectfully requests this Court vacate his sentence and remand his case for resentencing. In addition, if the Court determines the use of risk assessments is appropriate at sentencing, he also requests the Court establish guidelines for the use of risk assessments in sentencing decisions.

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.03, and that amount has been paid in full by the Office of the Appellate Defender.

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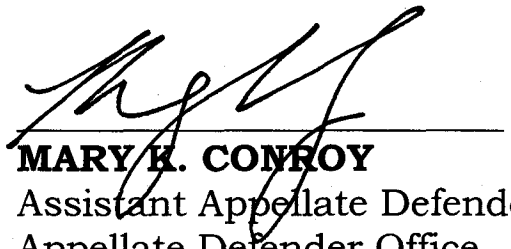

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